No. 86-2016

IN THE

Supreme Court of the United States

GREG MYERS, etc., et al.,
Petitioners,

vs.

R. KATHLEEN MORRIS, etc.,
Respondent.

and

DONALD BUCHAN, etc., et al,
Petitioners

vs.

R. KATHLEEN MORRIS etc.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT DEVRIES' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW (VERBATIM FROM PETITION)

I. Is a prosecutor absolutely immune from liability under 42 U.S.C. § 1983 regardless of the fact that she took over a child sex abuse investigation, directed the isolation of potential child complainants from their families in violation of federal and state law, repeatedly interrogated and manipulated the children, such that their testimony became accusatory and foreseeably unreliable, destroyed exculpatory evidence, and conspired with other county employees and their agents in these activities and a cover up?

The Court of Appeals for the Eighth Circuit held: in the affirmative.

II. Do parents and children lose the familial protections afforded by the United States Constitution merely because an assertion has been made alleging that the children have been sexually abused by the parents?

The Court of Appeals for the Eighth Circuit held: in the affirmative.

III. Do allegations of a conspiracy to violate civil rights between a prosecutor, sheriff and his deputies, social workers, therapists and guardian pierce the co-conspirators' immunities when acts taken in furtherance of the conspiracy include prosecutorial investigation; suppression of exculpatory evidence and presentation of false and misleading information at probable cause, pretrial and final hearings; and engaging in activities foreseeably damaging to the mental health of the children in violation of court order in which the co-conspirators were required to serve the best interests of the children?

The Court of Appeals for the Eighth Circuit held: in the negative.

IV. Does grossly negligent conduct by state officials rise to the level of a constitutional tort?

The Court of Appeals for the Eighth Circuit held: in the negative.

V. Are "therapists" and guardians ad litem absolutely immune from liability under 42 U.S.C. § 1983 when acting outside the scope of their court-ordered authority and engaging with police in investigative activities, in clear disregard of the psychological damage such activities entail to the children involved in the court proceedings?

The Court of Appeals for the Eighth Circuit held: in the affirmative.

VI. On a pre-discovery *Harlow v. Fitzgerald* summary judgment motion, where plaintiffs have not had the opportunity to present evidence in support of their complaint allegations, can an appellate court make the factual determination that police officers and other officials are immune because they acted in good faith?

The Court of Appeals for the Eighth Circuit held: in the affirmative.

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STATEMENT OF THE CASE

Respondent Susan DeVries is a licensed psychologist in the State of Minnesota and an employee of the Center for

Child and Family Therapy. (R-590).[1] She is a party to only one of these consolidated matters, *Donald and Cindy Buchan, et al. v. R. Kathleen Morris, et al.*

On June 4, 1984, Scott County officials removed the Buchan children from their home and arrested their parents. *See In Re Scott County Master Docket*, 618 F.Supp. 1534, 1543 (D. Minn. 1985). Mr. and Mrs. Buchan received a probable cause hearing on the criminal charges within two days of their arrest. *Id.* at 1545. On June 7, 1984, the Honorable John M. Fitzgerald presided over the immediate family court child custody hearing, directed that the court assume immediate custody and appointed Diane Johnson as guardian ad litem. (R-1365). On June 15, 1984, the Buchans appeared before the Honorable Michael A. Young and entered their denial to the petition.

The Buchans at all times received or waived numerous procedural safeguards including the right to be represented by counsel, to receive a review of the case status every eight days, and to receive a family court trial within ninety days. (*See e.g.*, RA-16). They were entitled to move the court for visitation rights, a change of therapists, a change of guardians, access to records, independently supplied counseling and transfer of custody to a person of their own choosing. *See* Minn.R.Juv.P. 39-59; and 618 F.Supp. 1534, 1546-47.

Following her appointment as guardian ad litem, Diane Johnson contacted DeVries and requested that she perform a psychological evaluation of the Buchan children, evaluate

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[1]References denominated "A" through "I" are to the petitioners' joint appendix. References denominated "RA" are to respondent Susan DeVries' appendix. References denominated "R" are to the designated record presented to the Eighth Circuit Court of Appeals.

the possibility of sexual abuse and provide therapeutic support. (RA-1; R-591). Johnson requested DeVries' involvement pursuant to order of the Scott County Family Court. (RA-1; R-596; R-609). Respondents not only failed to rebut the fact of DeVries' appointment, but in fact affirmatively acknowledged it by Affidavit, by their appellate brief, at oral argument to the Eighth Circuit Court of Appeals and by their petition to this Court. (*See* discussion *infra* at p. 5).

DeVries' first personal contact with the Buchan children occurred on June 22, 1984. (RA-1; R-591). Petitioners did not dispute the fact that DeVries' involvement began after removal of the children to the custody of the family court and commencement of criminal proceedings. Both the trial court and the court of appeals agreed. *See* 810 F.2d at 1453; and 618 F.Supp. at 1579.

On June 22, 1984, DeVries met with Scott County social worker Doris Wilker who provided DeVries with background information. (RA-1; R-591). DeVries met briefly with Melissa Buchan (then age 5) on that day. (RA-1; R-592). DeVries had seven additional sessions with Melissa Buchan prior to August 17, 1984. (RA-1; R-592). DeVries met with Billy Buchan (then age 20 months) on one occasion, July 24, 1984. (RA-1; R-591). She met with Courtney Buchan (then age 2½) on three occasions. (RA-1; R-591).

On August 17, 1984, DeVries submitted her report on the Buchan children to the guardian ad litem. (RA-1; R-592, 597). The report provided her professional opinions and recommendations based on the observations she made during the therapy sessions. Her recommendations were

in conformity with the accepted principles in the field of diagnosis, evaluation and therapy of suspected sexually-abused children. (R-610-623). The family court matter was tried before the Honorable Michael A. Young on August 28, 29 and 31, September 17, 18 and 19, 1984. (R-1167). DeVries testified on August 28, 1984. (R-1167).

Petitioners' complaint makes specific reference to Susan DeVries on just two occasions. (*See* C-4 at paragraphs 8 and 8.1). The first reference alleges that she acted under color of state law. The second reference alleges that on June 4, 1984, DeVries, with others, caused the removal of the minor children from their home.[2] The remainder of petitioners' complaint contains no specific allegations against DeVries but generally alleges that "the aforesaid actions by defendants were acts in furtherance of a conspiracy." (*See* C-6 at paragraph 19).

All of the defendants in these consolidated matters, including DeVries, moved the court for pre-discovery dismissal. Beyond the information developed in connection with the underlying criminal and family court proceedings, the parties also submitted affidavits and other materials in support of their positions. Petitioners based their claim against DeVries entirely upon her alleged participation in a conspiracy in the alleged capacity of an investigator.[3]

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[2]As previously discussed, the record established that the latter allegation was false as DeVries had no involvement in the Buchan matter prior to June 22, 1984. Petitioners at no time disputed this fact.

[3]"These individuals are joined as defendants because each of them appear to have been made part of the investigative team . . ." (R-1041).

". . . [T]he plaintiff's claim [against the therapists] is that of civil conspiracy." (R-1043).

"The therapist defendants are not joined in this suit for anything they may have done, or failed to do, in their capacity as mental health professionals. They are joined as being investigative agents of Kathleen Morris, and members of a conspiracy . . ." (R-1051).

In addition to the matter alleged in their complaint, petitioners submitted ten exhibits to the trial court and court of appeals, nine of which applied to other cases and other therapists. (*See* R-1060-1166). The Affidavit of Donald Buchan (RA-9; R-1113) was the only supporting exhibit submitted by petitioners with reference to Susan DeVries. In his Affidavit, Buchan attempted to recount the testimony Devries gave at the Buchan family court trial. In addition to the Buchan Affidavit,[4] petitioners presented the district court with a two-paragraph discussion of Susan DeVries with general reference to meetings and discussions between therapists and the county attorney's office with the apparent inference that the therapists must somehow be investigators. (*See* RA-10; R-1048-49). Petitioners presented no further supporting material to the district court and did not otherwise dispute the facts presented by DeVries in her Affidavit, report and other supporting materials.

Petitioners' brief to the court of appeals, however, cited to the legitimate trial court record on just two occasions. (*See* Appellees' brief (No. 85-5253-MN) at pp. 4-5). Additional disputes arose during the appeal concerning petitioners' attempts to place into the designated record documents which were not before the trial court. As a result, the court of appeals issued two orders in April 1986 permitting such expansion of the record as well as documents in response to the supplemental record. (*See* 810 F.2d at 1444. Contrary to the position taken in the petition, these orders resulted not only from petitioners' attempts to place materials

[4]The trial court read and considered the DeVries transcript and pointed out the factual inaccuracies of the Buchan affidavit. *See* 618 F.Supp. at 1579.

into the designated record in violation of Fed.R.App.P. 28(e), but also from a direct request to the court by one of the attorneys representing the plaintiffs. Additionally, for example, in support of her motion to the district court, DeVries submitted her affidavits stating that she acted "upon the order of the Scott County Family Court by arrangement of the guardian ad litem." (RA-1; R-596). Similarly, DeVries submitted the affidavit of the guardian ad litem which stated:

> Pursuant to the court's direction, I did contact and retain Susan DeVries to perform a psychological evaluation . . .

(RA-7). As mentioned, petitioners presented the district court with Donald Buchan's affidavit (RA-9) which also acknowledged DeVries' appointment. However, the trial court raised the issue of the mechanics of DeVries' court appointment on its own motion, citing the lack of a specific order as negatively inferring a fact question. In their brief to the court of appeals, petitioners again acknowledged that:

> Absolute immunity should not depend on whether certain documents are filed or whether certain words are uttered to confer formal status on a state agent. Absolute immunity should be dependent on the functions performed by the state agent.

(Appellees brief (No. 85-5253) at p. 9.) At oral argument, in response to blunt questioning by the panel, petitioner's counsel again acknowledged the absence of a material dispute on this issue. Nevertheless, the court of appeals asked for and received the transcript of the pertinent hearing (RA-16) at which the family court made its order. The excerpt

of the guardian ad litem's affidavit, quoted above, is wholly consistent with the order handed down by the family court. In addition, the Scott County Administrator provided his affidavit (RA-15), again at the request of the court of appeals, which confirmed that DeVries' compensation on the Buchan matter was made by the county in conformity with the procedures used for court appointments.[5]

Despite the volumes of testimony and other evidence generated from a variety of administrative, criminal, family court and civil proceedings, petitioners submitted nothing to dispute the facts presented by DeVries in her Affidavit, report and other supporting materials.

SUMMARY OF ARGUMENT

The Buchans' petition is wholly lacking in clarity and accuracy. No factual support of any kind accompanies the alleged facts. The questions presented are imprecise and argumentative. The supporting arguments cut aimlessly across the issues and many times do not flow from the question under discussion. Questions are presented with no supporting argument. Arguments are made on questions not presented.

The conspiracy question, for example, is entirely procedural but the petition does not even identify the court's procedural holding nor attempt in any way to address it. Conspiracy requires a meeting of minds; an agreement to

[5]The court of appeals discussed these facts at 810 F.2d 1466. These matters are set forth in an effort to familiarize the Court with the reasons underlying the court of appeals' decision to request additional materials; reasons that directly conflict with the imaginative position taken in the petition. (*See e.g.* Petition at p. 21, n.5). It should be noted, however, that although the petition discusses the propriety of the supplementation orders, it does not present it as a question for review. In addition, the petition neither raises nor discusses the question of the mechanics of DeVries' court appointment.

act in concert to an unlawful end. Petitioners argue, contrary to elementary procedural principles, that allegations alone are a sufficient response to a properly supported motion for summary judgment. Petitioners cite to illusory conflicts among the circuits, using cases that do not at all stand for the proposition advanced.

Petitioners are able to identify the constitutionally protected familial interest, but have presented no factual support that such right was violated without due process. Liberty interests are not absolute. The mere identification of a constitutional right, clearly established or otherwise, does not defeat qualified immunity if the right is not infringed without due process.

Petitioners argue for review of the grant of absolute immunity, not on the grounds that respondent is not entitled to it, but on the grounds that absolute immunity is defeated if the conduct in question (for which there is no factual support) proves, in hindsight, to be "counterproductive." The requested relief is contrary to the fundamental underpinnings of the doctrine itself and should be denied.

None of the questions presented by petitioners for review meet the standards set forth in Supreme Court Rule 17. Accordingly, the petition should be denied.

ARGUMENT

Supreme Court Rule 17 sets forth the character of reasons for the exercise by this Court of its discretion to review a matter on writ of certiorari. Among those special and important reasons are the following:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; . . .

> (c) When . . . a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, . . .

With respect to Susan DeVries, petitioners advanced no reason for issuance of a writ by this Court, but instead merely refer to the words in Rule 17 as an end in itself. With respect to Susan DeVries, the lack of accuracy and clarity alone supports denial of the petition under Supreme Court Rule 21.5.[6]

A. Petitioners Have Presented No Reviewable Issue Concerning The Claim Of Conspiracy.

The Buchans' petition identifies the question presented for review as follows:

> Do *allegations* of conspiracy to violate civil rights between a prosecutor, sheriff and his deputies, social workers, therapists and guardians pierce the conspirators' immunities . . .?

(Emphasis supplied). DeVries presented her motion to the district court as one for dismissal or for summary judgment and presented affidavits and other materials in support thereof. Fed.R.Civ.P. 56(e) does not allow a party "to rest upon the mere allegations or denials of his pleading", but instead requires the opposing party to "set forth specific facts showing that there is a genuine issue for trial." The court of appeals held:

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[6]The petition offers no specificity whatever with respect to Susan DeVries, makes no citation to the record and appends no materials beyond the complaint itself. In addition, for example, in an effort to "create" a conflict among the circuits, the petition blatantly misquotes the Ninth Circuit Court of Appeals. (*See* Petition at p. 14.) The petition supposedly quotes the Ninth Circuit's remarks concerning *Stump v. Sparkman*, 435 U.S. 349 (1978), when in fact the Ninth Circuit was discussing a completely different case. *See Ashelman v. Pope*, 793 F.2d 1072, 1077 at n.2 (9th Cir. 1986).

> . . . that the pleadings and record are deficient to create a triable issue as to the participation by any of the defendants in these appeals in a conspiracy to violate the [petitioners'] civil rights.

810 F.2d at 1453-54. In so holding, the court followed precedent which is both uniform among the circuits and consistent with the directives of this Court.

The question presented by petitioners to this Court is whether allegations alone are a sufficient response to a properly supported motion for summary judgment. The circuits have uniformly held that broad and conclusory allegations of conspiracy, unsupported by factual allegations, are not sufficient to support a cause of action under §1983. *See e.g. San Filippo v. United States Trust,* 737 F.2d 246 (2nd Cir. 1984); and *Slotnick v. Garfinkle,* 632 F.2d 163 (1st Cir. 1980). Allegations of conspiracy must be pled with sufficient specificity and factual support to suggest a meeting of the minds. *See Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 152 (1970); and *Deck v. Leftridge,* 771 F.2d 1168 (8th Cir. 1985); *see also, Kaylor v. Fields* 661 F.2d 1177 (8th Cir. 1981).

The question, as presented by petitioners, admittedly lists a series of alleged acts which were supposedly taken "in furtherance of the conspiracy" (and which, with respect to DeVries, have absolutely no support in the record). More importantly, however, petitioners would apparently ask this Court to hold that the mere recitation of such a list somehow provides sufficient factual specificity to suggest some antecedent meeting of the minds. The only conspiracy question fairly included in the petition is a procedural one having no implications beyond the specific facts of this case. Discussion of the alleged (and unsupported) acts belongs

with the issue of immunity for it is acts, not a conspiracy, which give rise to liability. Conspiracy itself gives rise to no liability but is merely the string by which a plaintiff seeks to tie together, for liability purposes, those who allegedly acted in concert. Petitioners submitted absolutely no factual support for their sweeping allegation that "the aforesaid actions by defendants were acts in furtherance of a conspiracy." Accordingly, the court of appeals properly evaluated each defendant's acts individually and applied the immunity law handed down by this Court.

The court of appeals searched but failed to find a genuine factual issue as to an alleged meeting of the minds followed by concerted activity toward an unlawful end. In *Matsushita Electric v. Zenith Radio,* U.S. (1986), this court addressed the procedural requirements of Rule 56(e) and stated:

> [T]he issue of fact must be "genuine." When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.

(Citations omitted). With respect to DeVries, the record reflects *only* that she met with the social worker and attended therapy sessions, interviews and a meeting to prepare for testimony. As the childrens' therapist, and a potential witness, such conduct was routine and necessary. DeVries' conduct consisted of exactly that which would be expected of a person in her position. The mere occurrence of these activities is insufficient to create a material issue of fact as to whether they were done as part of a concerted and unlawful effort stemming from some antecedent meeting of the

minds. *See San Filippo v. United States Trust,* 737 F.2d, 246, 256 (2nd Cir. 1984).[7]

The question of conspiracy involves nothing more than application of settled procedural concepts. No conflict exists in the circuits nor have petitioners presented any special and important reason why this Court should undertake a review of the Eighth Circuit's application of settled law to the specific facts of this case. The petition should be denied.

B. Petitioners Have Presented No Reviewable Issue Concerning The Court Of Appeals' Grant Of Qualified Immunity.

The issue of qualified immunity conceivably arises in the context of alleged inproper questioning of children.[8] The court of appeals held that Susan Devries and others are protected by qualified immunity for the questioning function.[9] With respect to Susan DeVries, this holding is particularly inappropriate for review by this Court.

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[7]Aside from the fact that petitioners presented nothing in support of an alleged conspiracy, the court of appeals noted the total implausibility of the conspiracy allegations:

> Why this diverse group of personalities and offices should have cooperated with each other in a scheme to advance R. Kathleen Morris' career is clarified nowhere in the pleadings, records or brief. Moreover, the records contain evidence wholly inconsistent with this allegation of common purpose.

810 F.2d at 1453. DeVries, for example, recommended *immediate* visitation between the Buchans and their youngest child (RA-2), a result wholly inconsistent with the alleged conspiratorial scheme. *Cf. Matsushita Electric v. Zenith Radio,* U.S. (1986).

[8]It is urged that this issue is not fairly included within the questions presented to the Court for review. It is discussed, however, in the interest of caution.

davit at RA-1.

[9]The limited involvement of DeVries in this area is set out in her affidavit at RA-1.

In the first instance, petitioners' complaint does not even allege improper questioning against DeVries. The complaint merely identifies DeVries (C-4), alleges that she acted under color of state law (C-4) and sweeps her into the net by alleging that "the aforesaid actions by defendants were acts in furtherance of a conspiracy." (C-6). In fact, petitioners' complaint does not specify even a single allegedly unconstitutional act by DeVries in her individual capacity. Participation in a conspiracy is the *only* act alleged against DeVries and even that is alleged in the abstract. From the outset, DeVries' status as a defendant rested entirely on secondary allegations that she participated in a conspiracy and therefore was allegedly responsible for the supposed acts of others. Absent a valid conspiracy claim, DeVries' conduct is not within the parameters of this case. Accordingly, although her acts, if they had been challenged, are protected by absolute and/or qualified immunity, DeVries urges that the immunity questions need not be resolved as a prerequisite to the denial of the petition as to her.

Aside from the absence of any claim, the court of appeals made the following observation:

> In the case of Susan DeVries, for example, no factual particularity at all is offered concerning any objectionable interrogation technique. Absent any information concerning improper questioning methods, we are at a loss to understand how a psychological evaluation or therapy can be accomplished for a juvenile suspected victim of sexual abuse if questioning itself is not permitted.

810 F.2d at 1466. Thus, petitioners not only failed to assert a claim, they also failed to present a genuine issue of material fact, again an elementary procedural issue having no implications beyond the facts of this case.

Even if the petitioners had made a claim of improper questioning and supported it with genuine issues of material fact, the court of appeals found that no clearly established constitutional norms govern such conduct. *See* 810 F.2d. at 1466; *see also, Mitchell v. Forsyth*, 472 U.S. 511 (1985). This issue, even under the most attenuated reasoning, is not fairly within the questions presented to the court for review. The petition indeed touches upon the general subject of questioning (C-15), but only with reference to the conspiracy issue and again with the apparent purpose of obtaining from this Court a holding, not that such alleged conduct is itself unconstitutional, but that the allegations themselves somehow provide sufficient factual specificity to suggest a conspiratorial meeting of the minds. Petitioners neither cite to authority nor advance any argument that clearly established constitutional norms govern the questioning of children in a sexual abuse context. For all of the above reasons, the petition should be denied.

Petitioners also arguably raised the issue of qualified immunity by presenting the following question for review.

> Do parents and children lose the familial protections afforded by the United States Constitution merely because an assertion has been made alleging that the children have been sexual abused by the parents?

A review of the argument advanced on this issue reveals only that petitioners are able to *identify* a constitutionally protected liberty interest. Petitioners neglect to identify conduct by Susan DeVries which would support a finding that such right was *violated* without due process of law.

The therapists supposedly "aided and abetted" the prose-

cutor in "activities designed to thwart" family reunification (Petition at p. 12), again a vague reference to the alleged conspiracy.[10] Such conclusory arguments cut across the entire petition but without reference to any acts attributed to DeVries. As the court of appeals noted, the thrust of petitioners' argument appears to be that various decisions, recommendation against visitation for example, were somehow tainted with constitutional impropriety merely because they impact upon a protected interest. But nothing in the Fourteenth Amendment protects against *all* deprivations of life, liberty or property. It protects only against deprivations without due process. *See Parrat v. Taylor,* 451 U.S. 527, 537 (1981). That petitioners have a protected familial interest has never been questioned. *See Santosky v. Kramer,* 455 U.S. 745 (1982). But petitioners have neither advanced an argument nor cited to any facts that DeVries *violated* their rights without due process.

It bears repeating that DeVries had no involvement until after the family court assumed custody of the children. Petitioners had substantial procedures available to them both prior to and contemporaneous with any involvement

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[10]In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this Court struck down the subjective element of the qualified immunity test and concluded that:

> [B]are allegations of malice should not suffice to subject government officials to the costs of trial or to the burdens of broad-reaching discovery.

Consistent with that directive, the court of appeals in this case held that "a conclusory and unsupported allegation of conspiratorial purpose fails to defeat an assertion of qualified immunity by a defendant otherwise entitled to that defense." 810 F.2d at 1453. Thus, conduct that is properly protected by qualified immunity does not lose its protection merely because a plaintiff alleges, without factual support, that such conduct was a part of a conspiratorial scheme. Any other holding would have the effect of allowing a plaintiff to replace one buzzword, "malice" with another, "conspiracy," a result which would totally defeat the underlying objective of *Harlow. See e.g. Anderson v. Creighton,* 55 U.S.L.W. 5092 (June 25, 1987).

of DeVries. The procedures in place at the time DeVries became involved amply protected against arbitrary deprivation of any protected interest. Before DeVries ever became involved in the case, petitioners had a full range of procedural protections. Minn. Stat. §260.171(2) and Minn.R.-Juv.P. 52.04(1) provide for a "detention hearing" within 72 hours of the child's removal from the home. That rule requires a finding by the court of probable cause and a further finding that release of the child would endanger himself or others. Absent such findings, the child must be released. Minn.R.Juv.P. 52.05. Minn.R.Juv.P. 40.01(1) provides the parents with the right to counsel and Minn.R.-Juv.P. 52.04(4)(d) requires the court to advise the parents of that right. The rules give the parents the right to be present at all hearings (Minn.R.Juv.P. 42.01) and to personally participate in those hearings (Minn.R.Juv.P. 39.02), or if represented, to participate through counsel. Minn.R. Juv.P. 39.06.

Minn.R.Juv.P. 52.07(1)(A) provides for informal placement review every eight days. Minn.R.Juv.P. 52.07(2)(B) allows the parents to request a formal placement review *at any time.* A properly based request for formal placement review allows the court to continue placement *only* if the court finds probable cause that the child or others would be endangered by the release. Minn.R.Juv.P. 52.07(2)(D). Minn.R.Juv.P. 57 provides the right to conduct discovery, including depositions.

Petitioners either received or waived each of these substantial due process protections. (*See e.g.* RA-16). These protections were not only available to petitioners before DeVries' involvement, but during and after her involvement as well. Furthermore, petitioners were entitled to and in

fact received a full trial on the merits within 90 days of the detention hearing. Minn.R.Juv.P. 59.02(1)(a). Minn.R. Juv.P. 59.03(2)(A) provided petitioners with the right to present evidence and witnesses, to cross-examine witnesses and to present arguments. Minn.R.Juv.P. 59.05 requires the state to prove the allegations by the heightened standard of "clear and convincing evidence."

DeVries' function was at all times subject to this all-encompassing procedural mechanism. It is perhaps repetitive to point out that petitioners accomplished their discussion with not a single reference to the actual conduct of Susan DeVries. In her role as a court-appointed therapist, Susan DeVries held therapy sessions with the Buchan children, provided a report with her professional recommendations and testified at the neglect proceedings. Petitioners apparently believe that they have the constitutional right to be free from the legitimate mechanisms through which the state tests neglect/dependency allegations.[11]

But a plaintiff must come forward with facts that not only identify a clearly established constitutional right,[12] but also identify conduct *by the individual defendant*[13] that constitutes a *violation* of the identified right. Anything less fails to state a compensable claim for relief. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), Justice Brennan set forth

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[11]*See e.g. Kaylor v. Fields*, 661 F.2d 1177, 1181 (8th Cir. 1981):

> Being the object of a criminal investigation, whether rightly or wrongly, is just one of the burdens to which every citizen is exposed.

The same must be said for the normal functions performed in connection with civil allegations of child sexual abuse.

[12]As the court of appeals observed:

> Qualified immunity would be meaningless if it could be defeated merely by the recitation of some well-recognized right and a conclusory allegation that that the defendant infringed it.

810 F.2d at 1459; *see also, Anderson v. Creighton*, 55 U.S.L.W. 5092, 5093 (June 25, 1987).

[13]Absent a conspiracy, qualified immunity law must be applied separately to each defendant.

the disposition to be made of cases, such as this, where a plaintiff identifies the constitutional right but fails to show a violation:

> . . . [S]ummary judgment will also be readily available whenever the plaintiff cannot prove, *as a threshold matter*, that a violation of his constitutional rights *actually occurred*.

Id. at 821 (Brennan J., concurring) (Emphasis applied). In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court reaffirmed *Harlow* and recognized that:

> Unless the plaintiff's allegations state a claim of *violation* of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.

(Emphasis applied); *see also, Anderson v. Creighton*, 55 U.S.L.W. 5092 (June 25, 1987).

Petitioners have done nothing but identify a protected interest. The cases supposedly in conflict with the court of appeals decision also recognize the familial interest, but do not stand for the proposition that the interest is absolute. The facts presented to the trial court and the court of appeals show DeVries' conduct to be proper, in routine conformity with accepted therapeutic principles and not in violation of due process. The decision in this case is entirely consistent with the directives of this court and the petition should therefore be denied.

C. Petitioners Have Presented No Reviewable Issue Concerning The Court Of Appeals' Grant Of Absolute Immunity.

This Court has followed the doctrine of absolute immunity for more than a century. *See e.g. Bradley v. Fisher*, 13

Wall. 335 (1872). The Court has extended this immunity to others who perform functions closely associated with the judicial process. *See Briscoe v. LaHue*, 460 U.S. 325 (1983); *Butz v. Economou*, 438 U.S. 478 (1978); and *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Court has stressed that absolute immunity is essential to protect the integrity of the judicial process and has recognized that the mere threat of retaliatory litigation "may significantly affect the fearless and independent performance of duty by actors in the judicial process." *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The Court has followed a functional approach to immunity law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982). "Our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983).

In *Butz v. Economou*, 438 U.S. 478, 512 (1978), the Court set forth the following factors, among others, as characteristic of the judicial process to be used in determining absolute immunity:

1. The need to insure that the individual can perform his functions without harassment or intimidation;
2. The presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;
3. The adversary nature of the process; and
4. The correctability of error on appeal.

The function performed by Susan DeVries was essential to the overall mechanism used by the State to test the neglect/dependency allegations. The policy underlying the Minnesota Juvenile Court Act requires that an alleged

neglected child be removed from the home "when his welfare or safety cannot be adequately safeguarded without removal." Minn. Stat. §260.011, subd. 2. In cases of alleged child sexual abuse, the Judge's function is to determine whether such sexual abuse occurred and to order placement of the child consistent with that determination and the child's "welfare and safety." To assist the Judge in that function, the Minnesota Juvenile Court Act provides as follows:

> Investigations; physical and mental examination
> . . . the court may order any minor coming within its jurisdiction to be examined by a duly qualified physician, psychiatrist or psychologist appointed by the court.

Minn. Stat. §260.151, Subd. 1.

The professional opinion of Susan DeVries provided the Judge with valuable information to use in his function as the finder of fact and arbiter of the children's welfare and safety. With respect to the *Butz* factors, DeVries performed her function after the children were already in the custody of the family court and thus her actions, opinions and recommendations were subject to a host of procedural safeguards[14] in a highly adversarial setting. Most importantly, it is difficult to conceive of a function requiring greater discretion than that of a therapist requested by the court to evaluate the mental health and counseling needs of an alleged sexually abused child. It is inherent in the nature of child neglect or abuse proceedings that a parent who stands accused of sexual acts will seek to place the blame for their child's emotional distress and their own criminal prosecutions on those involved in the judicial process. The protection of children from such abuse is a

compelling social policy which requires those involved with the children and the parents to act free from apprehension of retaliatory litigation.

The guidance provided to the circuits by this Court has produced caselaw consistent with its directives and the policy underlying immunity law. The Seventh and Ninth Circuits have extended absolute immunity to court appointed physicians and psychiatrists and the Sixth Circuit has done the same for psychologists and guardians ad litem. *See Kurzawa v. Mueller,* 732 F.2d 1456 (6th Cir. 1984); *Burkes v. Callion,* 433 F.2d 318 (9th Cir. 1970); *Bartlett v. Weimer,* 268 F.2d 860 (7th Cir. 1959); *Byrne v. Kysar,* 347 F.2d 734 (7th Cir. 1965); and *Duzynsk v. Nosal,* 324 F.2d 924 (7th Cir. 1963); *see also, Lawyer v. Kernodle,* 721 F.2d 632 (8th Cir. 1983).

Petitioners do not even question the propriety of the court's grant of absolute immunity to these persons (i.e. therapists and guardians) who were so integral to the judicial process. Instead, petitioners seek intervention by this Court for purposes of a subjective review of whether Susan DeVries (and others) exercised "independent judgment" and whether her function ultimately proved "counterprodutive to the children's best interest." (Petition at p. 18). Although nothing in the petition is entirely clear and although no factual specificity whatever is advanced with respect to DeVries, petitioners apparently seek a holding from this Court that actions which in handsight prove counterproductive lose the protection of otherwise applicable absolute immunity. Although the petition presents the absolute immunity issue as "an important question of federal law which has not been, but should be, settled by this

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[14] *See* discussion *supra* at p. 16.

Court" (Petition at p. 18), it nicely overlooks century-old precedent holding that such immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Bradley v. Fisher,* 13 Wall. 335, 347 (1872). The position advanced by petitioners attacks the very foundation of the doctrine itself by requesting judicial inquiry into both subjective motivation and the ultimate effectiveness achieved by persons intimately associated with the judicial process (and, of course, lacks factual support of any kind). The requested relief is contrary to the established directives of this Court and should be denied.

CONCLUSION

Petitioners have presented no reviewable question. The character of reasons for the exercise by this Court of its discretion to review a matter on writ of certiorari, set forth in Supreme Court Rule 17, is entirely absent. The petition contains no references to the record and appends no supporting factual material. The directives handed down by this Court have produced consistent decisions in the circuits. The "conflicts" urged by petitioner are illusory. The court of appeals' decision in this case plainly falls within the framework and guidance provided by this Court's civil rights opinions. Issuance of a writ should be denied.

Respectfully submitted,

Dated: July 9, 1987.

/s/ DOUGLAS J. MUIRHEAD
Douglas J. Muirhead
Counsel of Record
William M. Hart
Meagher, Geer, Markham, Anderson,
Adamson, Flaskamp & Brennan
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Attorneys for Respondent
Susan DeVries

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Donald Buchan and Cindy Buchan, individually and as parents and natural guardians of Courtney Beth Buchan, Melissa Ellen Buchan, and William Donald Buchan, minors,

Plaintiffs,

vs.

Scott County and R. Kathleen Morris, Scott County Attorney, Scott County Human Services, Human Services, Thomas Price, and Phipps-Yonas & Price, P.A., Michael Shea, and Shea Associates, P.A., Diane Johnson, Guardian Ad Litem, John Manahan, Guardian Ad Litem, Doris Wilker, Social Worker, Mary Tafs, Social Worker, Judy Dean, Social Worker, Susan DeVries, Psychologist, and Other Employees of Scott County Human Services Whose Names and Titles are Unknown, and Douglas Tietz, Scott County Sheriff,

Defendants.

AFFIDAVIT OF SUSAN DEVRIES

STATE OF MINNESOTA) ss:
COUNTY OF HENNEPIN)

Susan Devries, being first duly sworn on oath, deposes and states as follows:

1. Your affiant is a licensed psychologist authorized to practice and practicing in the State of Minnesota. At all

times material to the above-referenced lawsuit, your affiant has been an employee of the Center for Child and Family Therapy.

2. I was first contacted by the Guardian Ad Litem, Diane Johnson, and asked to become involved with the evaluation and counseling of William Buchan, Courtney Buchan and Melissa Buchan, the children of Don and Cindy Buchan, shortly before June 22, 1984. I was advised that the Social Workers with the Scott County Human Services Department were Mary Tafs and Doris Wilker. I was asked to perform a psychological evaluation of each of the youngsters, to evaluate the possibility of the occurrence of sexual abuse, and to provide therapeutic support to the children as needed.

3. My initial appointment with regard to the children was on June 22, 1984. I met with Doris Wilker at that time who provided me with background information.

4. I had one diagnostic session with Billy Buchan, on July 24, 1984. Billy Buchan was only 20 months old at the time, and largely pre-verbal. My evaluation was based upon my observations of Billy Buchan at this time, together with information provided by his foster mother. I recommended that supervised visitation between Billy Buchan and his parents should begin immediately.

5. Courtney Buchan was seen on three occasions, July 23, July 30 and July 31. She was 2½ years old. As set forth in detail in the psychological evaluation which I submitted on August 17, 1984, Courtney's interaction with anatomically correct dolls and her responses to verbal questions in the course of these sessions suggested strongly to me that Courtney had been sexually abused, and Courtney identified her two parents and her older sister, Missy, as the people who engaged in sexual touching with her.

Because of her very young age, I determined that it was not appropriate to engage in ongoing individual therapy with Courtney, but recommended that she be seen on an occasional basis to measure her emotional development and behavior reactions.

6. I first met Melissa Buchan briefly on June 22, 1984 when she accompanied Doris Wilker to my office. I then had seven additional diagnostic and therapy sessions with Melissa Buchan prior to preparing my psychological evaluation on August 17, 1984. Melissa Buchan was old enough to be given some of the standard psychological tests and a Rorschach Test and Children's Apperception Test were administered on August 15, 1984. As set forth in my psychological evaluation dated August 17, 1984, Melissa Buchan repeatedly and consistently reported abusive sexual touching on the part of her mother and father throughout my initial sessions with her. Based upon this course of evaluation, I formed the opinion that Melissa Buchan's statements were reliable and truthful, and further formed the professional opinion based upon Melissa Buchan's statements that both she and her sister Courtney had been sexually abused by their natural parents.

7. Attached hereto as Exhibit A is a true and correct copy of my August 17, 1984 psychological evaluation of the Buchan children.

8. Children commonly feel tremendous guilt and emotional distress when reporting abuse by their natural parents, even when doing so truthfully and honestly. It is most commonly the case, and specifically is true in this situation, that children who are sexually abused by their parents love those parents. It is often precisely this fact that engenders guilt and distress when children describe sexual abuse by

their parents. Also, it is not uncommon for the abusive adult to have threatened the child if the child reports the abuse. It is extremely important to the emotional well being of the child that he or she be protected from pressure or confrontation by the accused adult, since this causes the child to feel vulnerable and threatened. It is essential for children who honestly report incidences of sexual abuse to understand that they will be protected and will not be punished for speaking. For these reasons, I did not feel it was appropriate at first for Melissa or Courtney Buchan to have visitation with their parents. Because Billy Buchan was pre-verbal, and because there was no indication that he had been sexually abused by his parents, I recommended visitation between Billy Buchan and his parents start immediately.

9. Between August 17 and December 11, 1984, I had 17 additional therapy sessions with Melissa Buchan. Among the concerns dealt with throughout these sessions was to attempt to prepare Melissa Buchan for the possibility that she would be called to testify at a trial. I was attempting to prepare her for the emotional stress of testifying in a Court under both direct and cross-examination. In addition, throughout this period, I continued to ask Melissa Buchan questions regarding her allegations of sex abuse to determine whether her statements remained consistent and whether she was reliably able to distinguish between "real" and "pretend". At no time did I ever tell Melissa Buchan how she should answer questions, suggest information or statements to be made, or use leading or suggestive questions in talking to her.

10. I was present on two occasions when Melissa Buchan was interviewed by law enforcement officials. Diane Johnson, the Guardian Ad Litem, was present on both of these occasions. On August 17, 1984, Officer S. A. O'Gorman,

interviewed Melissa Buchan at the Scott County Attorney's Office. Melissa was very shy around Mr. O'Gorman, and Mr. O'Gorman asked me to question her about statements she had been making. Diane Johnson was aware of and approved this procedure.

11. On September 20, 1984, Melissa Buchan was interviewed by Officer Pat Shannon, of the Minnesota Bureau of Criminal Apprehension, in the presence of myself and Melissa's Guardian Ad Litem, Diane Johnson. I understood that I was present during that interview in order to safeguard the emotional well being of Melissa Buchan, and terminate the session if it became harmful to her emotional well being.

12. Your affiant was also present on August 17, 1984 when Officer O'Gorman interviewed Courtney Buchan. Again, at the request of Mr. O'Gorman, and with the approval of Diane Johnson who was also present, I asked questions during this interview which lasted for approximately three minutes.

13. Attached hereto as Exhibit B is a report prepared by S.A. O'Gorman which accurately reflects the substance of the two interviews discussed above.

14. On September 24, 1984, I was interviewed by Officer Pat Shannon, of the Minnesota Bureau of Criminal Apprehension. A copy of the transcript of that interview, which was provided to me by Mr. Shannon, is attached hereto as Exhibit C.

15. On several occasions during 1984, I encountered Kathleen Morris by happenstance. On these occasions, we would exchange greetings and small talk. Nothing of substance regarding my treatment of the Buchan children was said during these meetings. I can recall only two

meetings with Kathleen Morris during 1984 in which anything of substance was said. The first meeting was on September 23, 1984, when I met with Kathleen Morris to prepare for possible testimony the following week. The purpose of this meeting was to give me some idea of what to expect, since I had never testified in a criminal trial previously, and to discuss the nature of the opinions I was prepared to render in Court.

16. The other occasion when I had a substantive conversation with Kathleen Morris was on September 25, 1984. She advised me that it appeared the criminal prosecutions might become very long and drawn out and would require repeated testimony on the part of the children reporting abuse. She wanted to know whether I believed the children I was counseling would be emotionally and psychologically able to withstand the strain of repeated testimony. I responded that I did not believe this was a serious concern in my situation, since so far as I knew Melissa Buchan would only be called to testify at the trial of her own parents, and after numerous discussions of this with Melissa Buchan I had determined that such testimony would be stressful for her, but not inappropriate or damaging.

20. I had a meeting with Gehl Tucker and a gentleman named Rick, from the Scott County Attorney's Office, on September 29, 1984, to prepare for testimony I would give in a family court hearing in the Buchan matter.

21. The psychological evaluations of Melissa, Courtney and William Buchan which I conducted, were conducted upon the order of the Scott County Family Court by arrangement of the Guardian Ad Litem. I provided my report of the psychological evaluation to the Guardian

Ad Litem, Diane Johnson. At all times, I acted at the direction of the Guardian Ad Litem, and I specifically deny that I performed psychological consulting services for the Scott County on a contract basis, as alleged in ¶ 8 of plaintiff's Complaint.

22. I was not present at, or aware of, any other police interviews with Melissa Buchan, Courtney Buchan, or William Buchan at any time.

FURTHER YOUR AFFIANT SAYETH NOT EXCEPT THAT THIS AFFIDAVIT IS SUBMITTED IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

/s/ SUSAN DEVRIES
Susan Devries

Subscribed and sworn to before me this 15th day of May, 1985.

/s/ HOLLY J. DYSON
Notary Public, Minnesota
Hennepin County

My Commission Expires Apr. 8, 1990

(Title of Cause.)

AFFIDAVIT OF DIANE JOHNSON

STATE OF MINNESOTA)
COUNTY OF HENNEPIN) ss:

Diane Johnson, being first duly sworn on oath, deposes and states as follows:

1. I was appointed by Scott County Family Court to be Guardian Ad Litem for Melissa, Courtney and William Buchan in June, 1984. Pursuant to my appointment, I

asked the Court to appoint a therapist for the children, and suggested Susan DeVries act in that capacity since I was familiar with her qualifications. Pursuant to the Court's direction, I did contact and retain Susan DeVries to perform a psychological evaluation of each of the youngsters, and to provide therapeutic support to the children as needed.

2. I received a written psychological evaluation of the Buchan children from Susan DeVries in August, 1984.

3. I was present on August 17, 1984, when Melissa and Courtney Buchan were separately interviewed at the Scott County Attorney's Offices by Officer S. A. O'Gorman. That interview was also attended by Susan DeVries. On information and belief, Officer O'Gorman asked Susan DeVries to question the children. She did this with my knowledge and approval.

4. Both I and Susan DeVries were present on September 20, 1984, when Melissa Buchan was interviewed by Officer Pat Shannon. I wanted Susan DeVries to be present at that interview in order to safeguard the emotional well being of Melissa Buchan, and assist me to terminate the session if it became harmful to her best interests.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ DIANE JOHNSON
Diane Johnson

Subscribed and sworn to before me this 15th day of May, 1985.

/s/ CAROL A. SEIFERT
Notary Public - Minnesota
Scott County
My Comm. Exp. 4-25-91

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE SCOTT COUNTY Master Docket No. 3-85-774
[Filed on behalf of Plaintiffs Myers (Civ. No. 4-84-1066) and Buchan (Civ. No. 3-84-1615)]

AFFIDAVIT OF DONALD BUCHAN

STATE OF MINNESOTA)
COUNTY OF HENNEPIN) ss:

The undersigned, being first duly sworn, hereby deposes and says:

1. That he is a plaintiff in the instant matter.

2. That he was present at a family court hearing in late September, 1984, before the Honorable Michael Young, *In the Matter of the Welfare of Buchan Children.*

3. That Susan DeVries testified at that hearing and stated under oath:

(a) She had been requested by Doris Wilker to *investigate* whether sexual abuse occurred in this case, and she did so investigate as well as provide therapy.

(b) Judge Young indicated that he had not appointed Ms. DeVries as an investigator, and that her functioning in that capacity was outside the scope of his appointment.

(c) She was providing these services under contract to Scott County.

Further affiant sayeth not.

/s/ DONALD BUCHAN
Donald Buchan

(Title of Cause.)

RESPONSE TO DEFENDANT THERAPISTS MOTIONS FOR DISMISSAL ON SUMMARY JUDGMENT

Joined as party defendants in this unit suit are various individuals characterized as "therapists" who rendered services to the prosecution and the investigative team in the "Scott County cases". With respect to the Myers and Buchans the individuals who have been joined as defendants are Michael Shea, Susan Devries, Thomas Price, Phipps-Yonas & Price (a professional association), Michael Shea and Associates (a professional association).

These individuals are joined as defendants because each of them appear to have been made part of the investigative team, gathering information for chief investigator, Kathleen Morris, and each of them seems to have been indifferent to the welfare of the juveniles who were their "patients" and the minor plaintiffs herein.

The "therapists", hand picked by R. Kathleen Morris (See Campion tape recorded statement of Kathleen Morris), entered into an agreement, an extra-judicial conspiracy, to prevent the plaintiffs, and the Court, from having access to the information that they were constitutionally entitled to have. By denying information that these adult plaintiffs were not guilty of crimes, and were entitled to the return of their children, the conspirators denied the plaintiffs a full and fair hearing in the family Court, and the benefits of due process of law.

From all evidence available to the plaintiffs, these individuals acted in concert with the prosecutors and investigators throughout the State Court proceedings, to facilitate

obtaining criminal convictions heedless of the truth of the allegations of criminal wrong doing. They abandoned their role as therapists, and acceeded to the wishes of the investigators to: (1) Prevent the return of the children to their parents; (2) Inhibit or ban written and telephonic communication with the parents; (3) Bar visitation by the parents; (4) Hide from various courts the denials by the children that they were sexually abused; (5) Present the various accusations of the children as being true, where a reasonable investigator under similar circumstances would have known of their unreliability; (6) Acted as a "cross-germinator" of accusations, and presented a story developed in one child to another for confirmation; (7) Failed to act to prevent the other county officials from depriving the plaintiffs of their rights; (8) Agreed with the other conspirators to prevent information from reaching the plaintiffs or the Court that would result in a full and fair hearing on the issue of child custody.

There is a substantial factual dispute between the plaintiffs, and the defendant therapists, concerning their role in the prosecution of the plaintiffs in State Court. Unfortunately, because plaintiffs' discovery has not yet begun and the primary evidence of their roles is in the possession of various of the defendants, the full extent of the evidence to be offered at trial is not available for the Court's consideration at this point. Some evidence is available, however, which gives an indication of the nature of the case to be presented at trial.

The plaintiffs are not claiming that each of the acts, or series of acts, described above, necessarily deprived them of a federally secured right, except as it may have denied them substantive due process. The plaintiffs' claim is that

of civil conspiracy; that these defendants agreed with the other investigators to develop evidence against the adult plaintiffs for criminal and juvenile Court, in reckless disregard of its truth. In doing so, their acts must be seen as they relate to furthering the purposes of the group of conspirators.

ANSWER BY TOM PRICE:

That's correct. (T. 31).

What Mr. Price did not disclose at that hearing, despite broad questioning by the Court (T.P. 6) is that he possessed a report and recommendation of the psychologist, Judy Bevans, who had recommended, in light of the fragile mental state of the Myers children, that they have supervised visitation with their parents. (Appendix 6). Price had, prior to their hearing, supplied copies of psychologist Bevan's report and recommendation to Paul Thomsen and Miriam Wolf. Although both of them were present and participating in the hearing, neither informed the Court or parents for the children of the report and recommendation.

Mr. Price stated that as of April 19, 1984, he had seen Amy Myers on six occasions, and Andy Myers on eight occasions (T.P. 3). He did not disclose to the Court that the children specifically denied being sexually abused in those sessions. (Appendix 4, p. 41) (Appendix 5, p. 208-209).

II.

SUSAN DEVRIES

According to the testimony of Doris Wilker, all the therapists had meetings with the County Attorneys investigative

staff. (Apendix 10). According to Kathleen Morris, when a therapist would discover a new fact that about sexual abuse, the therapist would immediately call Kathleen Morris. (Appendix 8).

Susan DeVries also testified, in a hearing not yet transcribed, conducted before Judge Young, in September 1984, *In Re the Welfare of the Buchan Children,* that (1) she had been requested by Doris Wilker to *investigate* whether sexual abuse occurred, and she did so investigate, as well as to provide therapy to the Buchan children; and (2) she was providing services under contract to the County. (Appendix 7).

III.

MICHAEL SHEA

As with Susan DeVries, the inferences derived from Doris Wilker's testimony is that the investigators of the County Attorneys office were meeting with him as part of the investigative strategy. In addition, the plaintiffs here have in their possession a videotape of one of the child victims of the County, being interviewed by Michael Shea. That tap was obtained from the Scott County Sheriff Department as a product of the criminal discovery process. The reasonable inference from the possession of the tape by the Sheriff's Department is that with their interrogators that they had been sexually abused. To accomplish this secondary goal, the conspirators concealed psychologist recommendations, exculpatory evidence and mitigating evidence from the Court and the plaintiffs. The conspirators agreed that it was necessary to prevent family unification as long as possible, perhaps indefinitely, so they refused to recognize the federally protected rights and procedures

enacted in the Minnesota Agency Rules, which minimize the coercive influence of government into the family unit. Finally, these defendants, state actors, were in a position to prevent the abuses occurring to the plaintiffs, and for that reason should be liable.

I.

A THERAPIST ACTING AS AN INVESTIGATOR HAS NO MORE IMMUNITY THAN AN INVESTIGATOR.

The therapist defendants are not joined in this suit for anything they may have done, or failed to do, in their capacity as mental health professionals. They are joined as being investigative agents of Kathleen Morris, and members of a conspiracy to prevent these plaintiffs from exercising their due process rights, and preventing them from reuniting their families. By acting as investigators for the County, they are acting under color of law, and are entitled to only qualified immunity. *Dennis v. Sparks,* 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 85-5253-MN

Donald Buchan and Cindy Buchan, individually and as parents and natural guardians of Courtney B., Melissa Ellen and William Donald Buchan, minors,

Appellees,

vs.

Susan Devries, et al.,

Appellant.

Joseph F. Ries, being first duly sworn on oath deposes and states on oath:

1. This affiant is the County Administrator for the County of Scott and has held that position since 1971.

2. Attached hereto as Exhibits A through K are true and correct copies of purchase orders for payment for services performed by Susan Devries relative to the Buchan children. These purchase orders are consistent with payment for services pursuant to court order and following a thorough examination of coun-

ty records this affiant can find nothing to indicate that payment was made on any other basis.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ JOSEPH F. RIES
Joseph F. Ries.
Scott County Administrator

Subscribed and sworn to before me this 20th day of May, 1986.

/s/ BARBARA A. NESS
Notary Public, Minnesota
Scott County

My Commission Expires Feb. 26, 1989.

STATE OF MINNESOTA
County of Scott

DISTRICT COURT
First Judicial District

FILE NO. 84-06324

EXCERPT OF HEARING

In the Matter of the Welfare of: Courtney Beth, Mellisa Ellen, and William Donald Buchan,

Children.

The above entitled matter came on for hearing before the Hon. Michael A. Young, one of the judges of the above named court, without a jury, in the Scott County Court House in the City of Shakopee, County of Scott and State of Minnesota on the 15th day of June, 1984.

APPEARANCES

MS. MIRIAM J. WOLF, Assistant County Attorney, Scott County Court House, Shakopee, Minnesota 55379, appeared for the Petitioner.

MR. DONALD NICHOLS, Attorney at Law, 4644 IDS Center, Minneapolis, Minnesota 55402, appeared for Donald Buchan and for this hearing only for Cindy Buchan.

MS. DIANE K. JOHNSON, Attorney at Law, Shakopee, Minnesota 55379, appeared as Guardian ad Litem for the Buchan Children.

MR. & MRS. DONALD BUCHAN appeared personally.

(Whereupon the following proceedings were had in open court:)

THE COURT: What I intend to do, Mr. Nichols, at least on a temporary basis, is set the fact finding hearing on this matter for Tuesday the 28th of August, instruct my clerk to block out my calendar for four days. In addition I am going to order that this matter be accelerated on the calendar. In the event that the psychological evaluations are completed and everyone is ready for hearing before that date you can either formally or informally make a motion to accelerate it on the calendar and I will simply set an earlier date for trial and get the assignment clerk to get another judge to handle my regular calendar.

MR. NICHOLS: I will be in a position next week to make that decision. You are saying the 28th?

THE COURT: That is a date certain.

MR. NICHOLS: If I want a quicker date I have to bring a motion before you?

THE COURT: If the parties are ready I want it on earlier. I don't want this thing to drag out any longer than necessary.

MR. NICHOLS: My client would like to get it on earlier.

THE COURT: I would be glad to try it next week, but the psychologicals won't be ready. I assume, Miss Johnson, you are requesting psychologicals on the children?

MS. JOHNSON: Yes, I believe so.

THE COURT: Is it necessary to go through a formal motion?

MS. WOLF: I believe the Court can order it on its own motion.

THE COURT: Any objection?

MR. NICHOLS: I have no objection.

THE COURT: A psychological is ordered as well as a psychological as far as Mr. Buchan. What is your position on the eight day review?

MR. NICHOLS: Your Honor, those seem not worth pursuing and not worth the Court's time. We would just like our fact finding hearing as soon as possible. We are prepared to waive those, Your Honor.

THE COURT: In behalf of Mr. Buchan then the eight day reviews are considered waived. Again, I want it understood, at any time during these proceedings, any time a matter comes up that you feel merits attention you are free to bring the matter before me at any time.

STATE OF MINNESOTA)
COUNTY OF SCOTT) ss.

REPORTER'S CERTIFICATE

I, James E. Benson, District Court Reporter, First Judicial District, State of Minnesota, do hereby certify that I reported the foregoing proceedings in stenotypy and thereafter transcribed the same as evidenced by the foregoing partial transcript and that the same is true and correct of my original shorthand notes of said matter before the Hon. Michael A. Young, one of the judges of the above named court.

/s/ JAMES E. BENSON
James E. Benson
District Court Reporter
Scott County Court House
Shakopee, Minnesota 55379